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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a local government avoid the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions (including "impact" fees) by legislative enactment?

LIST OF ALL PARTIES

Petitioner: Agencia La Esperanza Corporation, Inc.

Respondents: Orange County Board of Supervisors and Orange County Public Facilities and Resources Department.

CORPORATE DISCLOSURE STATEMENT

Petitioner Agencia La Esperanza Corporation, Inc., is a privately held corporation. There is no parent corporation; there are no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Agencia La Esperanza Corporation, Inc. (Esperanza) respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The final unreported opinion of the California Court of Appeal is reproduced as Appendix A to this petition. The Court of Appeal's unreported order denying a petition for rehearing and modifying the opinion is reproduced as Appendix B. The California Supreme Court's denial of review is not reported; it appears at Appendix C to the petition. The Judgment of the superior court is unreported and is reproduced as Appendix D. Finally, the Notice of Entry of Judgment from the superior court is reproduced as Appendix E.

JURISDICTION

The opinion of the California Court of Appeal was filed on April 24, 2002. Rehearing was denied and the opinion was modified by an order filed on May 22, 2002. The order of the California Supreme Court denying Esperanza's Petition for Review was filed July 10, 2002. This petition is timely under Supreme Court Rule 13. On September 27, Justice O'Connor granted Petitioner's timely application to extend the time within which to file the petition to and including October 23, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

California Government Code Section 66001, as amended by the statutes of 1996, chapter 569, Section 1, entitled, "Procedure in action establishing or increasing fee as condition of approval by local agency," is set out in Appendix F to this petition.

STATEMENT OF THE CASE

A. Factual Background

Agencia La Esperanza Corporation (Esperanza) built a 110,414-square-foot self-storage facility[1] in Orange County, California. A condition for approval of building permits to construct the project required that Esperanza pay transportation mitigation fees assessed under various fee programs, including two Orange County programs—the Moulton Parkway/Laguna Niguel Area (Moulton Parkway) and Coastal Area Road Improvement and Traffic Signals (Coastal Area) fee programs (jointly, Fee Programs). Fees collected under the Moulton Parkway fee program finance road improvements to arterial

[1] The Institute of Transportation Engineers refers to self-storage facilities as mini-warehouses and defines them as buildings in which a number of storage units or vaults are rented for the storage of goods. *See* Institute of Transportation Engineers, *Trip Generation* (6th ed. 1997).

highways in South Orange County, and fees from the Coastal Area fee program finance the construction of specific road, intersection, and traffic signal improvements in the coastal area of unincorporated Orange County.

The amount of the fees imposed on new development are based on general factors that do not account for differences in traffic generation rates for various types of commercial development. The fees are calculated based on the use (residential or nonresidential), the gross square footage, and the area of benefit as defined in the Fee Programs. So commercial, nonresidential development projects, such as Esperanza's self-storage facility, are assessed at the same amount per square foot as all other nonresidential uses in the same area of benefit. The Fee Programs do not account for the fact that self-storage facilities have significantly less impact on local transportation systems than most other types of commercial development.

Neither Esperanza nor Orange County conducted a site-specific traffic study to determine the impact of the project. But Esperanza presented evidence—undisputed by the County—of national and local trip generation rates of self-storage facilities and other types of commercial development. That evidence included national trip generation rates published by the Institute of Transportation Engineers, a source commonly relied upon by traffic engineers. The Institute's traffic generation calculations, applied to the facts of this case, demonstrate the complete lack of proportionality between the fees paid by Esperanza and the impact of the project on local transportation systems. Esperanza's project generates about 276 trips per day. A slightly larger medical clinic[2] (112,000 square feet) generates as many as 3,522 trips per day, and a much smaller medical-dental

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[2] Clinic is defined by the Institute of Transportation Engineers as a facility which provides limited diagnostic and outpatient care, but does not provide prolonged in-house medical and surgical care.

building[3] (45,000 square feet) generates approximately 1,626 trips per day. Yet, under the Fee Programs, Esperanza must pay the same fee per square foot as a medical clinic and a medical-dental office. Thus, under the Moulton Parkway fee program, Esperanza is forced to pay approximately $220 per trip generated. But a clinic would pay only $17.49 per trip and a medical-dental office would pay only $15.22 per trip.

Similarly, under the Coastal Area fee program, the nonresidential fee assessed against Esperanza's facility equals slightly more than $486 per trip. In contrast, a medical clinic would pay approximately $38.64 per trip, and a medical-dental office would pay $33.63.

B. Judicial Proceedings

After unsuccessfully appealing the amount of the transportation mitigation fees to the Orange County Public Facilities and Resources Department and the Orange County Board of Supervisors, Esperanza filed a petition for writ of mandate and complaint in the Orange County Superior Court. Esperanza contended that "the current fee scheme violates a variety of constitutional, statutory and case laws." Appendix at A-2. Esperanza's central argument was twofold. First the fee structure "amounts to an unconstitutional taking because the amount of the fees is unrelated to the volume of traffic the project generates." *Id.* at A-2 to A-3. And second, the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is the proper test for determining the constitutionality of the relationship between the imposed fees and the project's impact. *Id.* at A-3 to A-4.

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[3] A medical-dental office building is defined by the Institute of Transportation Engineers as a facility which provides diagnoses and outpatient care, does not provide prolonged in-house medical and surgical care, and is generally operated by one or more private physicians or dentists.

Esperanza challenged the sufficiency of the relationship of the development fees and the effects attributable to its development project under provisions of the Mitigation Fee Act, California Government Code Section 66000, *et seq*. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 438 (Cal.), *cert. denied*, 519 U.S. 929 (1996) ("[D]evelopers who wish to challenge a development fee on either statutory or constitutional grounds must do so via the statutory framework provided by the Act."). The case was tried by the court on stipulated facts, on January 21, 2000. The next month, the trial court ruled for the County. The Fourth District Court of Appeal, Division Three, affirmed the trial court's decision.

As the court of appeal observed, Esperanza raised a number of "federal constitutional claims" in the trial court and on appeal. Appendix A at A-2, A-5 to A-6. Among these were the argument that the federal Takings Clause—particularly as interpreted by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan*—demands that "heightened scrutiny" be applied as "the appropriate standard for judicial review of the fees imposed on [Esperanza's] project by the County." *Id.* at A-3 to A-4. The lower court rejected this federal constitutional argument on the authority of *Ehrlich*'s crabbed interpretation of the Takings Clause. *See id.* at A-4 to A-5. The court held that *Dolan*'s rough proportionality test does not apply to the exaction imposed on Esperanza's project for the sole reason that the exaction was imposed via legislation. *Id.* at A-4.[4] To challenge this ruling, Esperanza timely files this petition for certiorari.

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[4] The California Supreme Court denied review. Appendix C.

REASONS FOR GRANTING THE WRIT

On an important question of regulatory takings law, the court below issued a decision that is in conflict with the decisions of other lower courts, both state and federal. This conflict warrants resolution by this Court.

I

THE LOWER COURTS ARE SPLIT ON WHETHER *DOLAN*'S "ROUGH PROPORTIONALITY" STANDARD APPLIES WHEN EXACTIONS ARE IMPOSED, NOT ON AN INDIVIDUAL AND DISCRETIONARY BASIS, BUT INSTEAD BY LEGISLATIVE ACTION

Legal scholars describe a "nationwide split of authority" on the question of *Dolan*'s applicability to legislatively adopted exactions (*see, e.g.*, Faus, Richard Duane, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000)), and point out the confusion and inconsistency created by a legislative/adjudicative distinction (*see, e.g.*, Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000)).

As described above, the lower court in this case concluded that the "rough proportionality" standard of *Dolan* does not apply to legislatively enacted exactions. Some state courts agree. But other state courts and two lower federal courts refuse to let the method by which exactions are imposed dictate the constitutional test to be applied in a regulatory takings case.

A. Many State Courts and Two Lower Federal Courts Balance the Benefits and Burdens of Regulation by Applying *Dolan*'s Middle Level of Scrutiny to Legislatively Imposed Exactions

Ohio: In *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353 (Ohio 2000) (*Beavercreek*), the Ohio Supreme Court considered the constitutionality of an ordinance that established "a system of impact fees payable by developers of real estate to aid in the cost of new roadway projects." Specifically, the court considered the developers' assertion that "the ordinance produced an illegal taking of property without just compensation in violation of the United States and Ohio Constitutions." *Id.* at 354.

Noting that courts in other states "have formulated several tests that can be applied in evaluating a Takings Clause challenge to an impact fee ordinance," *id.* at 355, the Ohio court explicitly adopted the test "based on the *Nollan* and *Dolan* cases," *id.* at 356. Like *Nollan* and *Dolan*, the "dual rational nexus test" adopted by the Ohio court for impact-fee ordinances applies a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits. *Id.* at 355-56. *Cf. Dolan*, 512 U.S. at 390 (noting the "intermediate position" of many courts that required a municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development); *id.* at 391 (adopting that middle level of scrutiny as "the federal constitutional norm" but relabeling it "rough proportionality" to avoid confusion of terms).

Illinois: In *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995), the Home Builders Association argued that state enabling statutes and county ordinances imposing transportation impact fees on new development "violate the takings clauses of the fifth

amendment of the United States Constitution and . . . the Illinois Constitution." *Id.* at 388. The Illinois Supreme Court relied on this Court's takings jurisprudence, including *Nollan* and *Dolan*, to establish the minimum level of protection due under the Takings Clause. *Id.* at 388-89. The court noted the variety of tests applied by courts in other states to examine the relationship between demanded exactions and the projected impact of new development. *Id.* at 389 (citing *Dolan*, 512 U.S. at 389-90). Ultimately, the Illinois court applied a more exacting standard of scrutiny than is required by *Dolan*—the "specifically and uniquely attributable" standard it had developed earlier in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). *Northern Illinois Home Builders*, 649 N.E.2d at 389.[5] Like *Dolan*, the "specifically and uniquely attributable" test requires that local government demonstrate proportionality—albeit a direct proportionality—between an exaction imposed on new development and the specifically created need for additional traffic. *Id.* at 389-90. *See Dolan*, 512 U.S. at 389-90.

New York: The New York Court of Appeals struck down a legislatively enacted rent stabilization ordinance as an unconstitutional taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). The court described the holdings of several of this Court's constitutional takings decisions, *id.* at 481-83, including *Dolan*, and explained that "[w]e are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners," *id.* at 482. The rent stabilization ordinance did not pass constitutional scrutiny because it allowed an "indeterminate and unjustifiable burden [to be]

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[5] *See Dolan*, 512 U.S. at 389-90, wherein this Court discussed, but did not adopt, the *Pioneer Trust* standard.

draped disproportionately on the particular [apartment] owners' shoulders." *Id.* at 483.

Washington: *Trimen Development Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994), is a Washington Supreme Court case challenging in lieu of dedication fees assessed pursuant to a King County Council ordinance. The court upheld the fees after deciding that the amount of the exaction was "reasonably necessary" to provide for the increased need for park land and open space created by Trimen's subdivisions. *Id.* at 194. Specifically, the court concluded that "the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development. *See Dolan v. Tigard* ('rough proportionality' between required dedication and impact of proposed development)." *Id.* (citations omitted).

United States District Court for the Eastern District of Virginia: In *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. 1996), the district court upheld a Chesterfield County Policy adopted to guide the county's acceptance of proffers allowed by an earlier-adopted ordinance. The money from the proffers was to be used to offset the increased cost of specific capital improvements necessitated by proposed residential developments. *Id.* at 168-69. The policy, applicable to all residential rezoning requests, established a method for calculating the maximum proffer that could be tendered with a rezoning application. *Id.* at 168.

The Home Builders asserted that, on its face, the proffer policy "violates the Fifth Amendment to the United States Constitution's prohibition on taking of property without just compensation." *Id.* at 167. The court upheld the policy because

> there is no reason apparent on the face of the Policy why the proffers required, if any, can not [be]

> determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard.*

Id. at 169.

First Circuit: *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), involved a challenge to a low-income housing fee imposed when the owner of the site of some low-income apartments sought permission to replace the apartments with new condominiums. *Id.* at 12-13. The developers negotiated with city authorities to obtain a zoning change, and those negotiations resulted in several draft ordinances. *Id.* at 13. The draft ordinance ultimately approved by the city planning board provided for a payment or impact fee "designed to compensate the City for the impact upon it expected to result from the loss of low income housing." *Id.* at 12-13. And the parties negotiated more impact fees to be paid to the city by the developers in accordance with the terms of a promissory note. *Id.* at 13.

The challenge to the fees was burdened with a statute of limitations issue that dominated the opinion, but the court noted that undisputed facts showed that "no rational nexus existed between the amount of the Developers' . . . [fee] and any burden imposed on the City due to the zoning change." *Id.* at 14. The court uses the term "rational nexus" as a *Dolan*-style assessment of the relationship between the amount of a fee and the burdens imposed on a municipality by the development. "The district court . . . went on to find factually that no rational nexus existed here as between the $2,500,000 payment sought by the City and any demonstrable burden to be borne by it due to the zoning change." *Id.* at 13.

B. Other Courts Refuse to Apply *Dolan*'s "Rough Proportionality" Test to Legislatively Imposed Exactions

California: The California Supreme Court applies the *Nollan* and *Dolan* tests to monetary exactions imposed on an individual and discretionary basis (*Ehrlich v. City of Culver City*, 911 P.2d at 444), but will not apply the same standard to exactions imposed by generally applicable legislation. *See, e.g.*, *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002), and *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993, 1001-02 (Cal.), *cert. denied*, 526 U.S. 1131 (1999). The court reasons that heightened scrutiny does not apply to exactions in the form of generally applicable development fees, because "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Ehrlich*, 911 P.2d at 444.

Colorado: In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001), the Colorado Supreme Court refused to apply *Dolan*'s rough proportionality standard to a sanitation district fee imposed on a residential townhouse project. The court adopted a very narrow interpretation of *Nollan* and *Dolan* that limits application of the nexus and rough proportionality tests to a narrow set of cases involving property exactions and discretionary adjudicative determinations specific to one landowner and one parcel of land. *Id.* at 695-97. "One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system." *Id.* at 696.

Oregon: In *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 967, 982 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002), where a business challenged the constitutionality of

a traffic impact fee assessed on a development pursuant to a county ordinance, the Oregon Court of Appeals determined that legislatively imposed and calculated development fees are not subject to *Dolan*.[6] The court agreed with the California Supreme Court's contention in *Ehrlich* and *San Remo Hotel* that *Dolan* only applies "with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions." *Id.* at 982. The court does apply *Dolan*'s standard of heightened scrutiny to legislatively authorized dedications of property. *Schultz v. City of Grants Pass*, 884 P.2d 569, 572-73 (Or. 1994). The contradiction between *Schultz* and *Rogers Machinery* was explained as follows: "[W]e appear to have suggested that there were significant discretionary aspects to the land use decision [in *Schultz*]." *Rogers Machinery*, 45 P.3d at 979.

Arizona: The Arizona Supreme Court upheld a water resources fee assessed on new development in *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997). The court said that *Dolan* did not apply to the fee because the fee resulted from "a generally applicable *legislative* decision," which does not involve the same risk of regulatory leveraging that occurs when a landowner must bargain for approval of a particular use of land. *Id.* at 1000.

North Dakota: Burlington Northern Railroad Company challenged a requirement that it modify and maintain drains, bridges, and culverts to accommodate increased water flow resulting from drain improvements made by the Southeast Cass Water Resource District. *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W.2d 884, 885 (N.D. 1995). The Supreme Court of North Dakota distinguished the facts of *Dolan* by explaining that

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[6] Rogers Machinery will seek review by this Court.

Burlington Northern's duty "arises not from a municipal 'adjudicative decision to condition,' but rather from an express and general legislated duty under a constitutional reservation of police power over a corporation." *Id.* at 896.

Georgia: In *Parking Association of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995), the owners and managers of surface parking lots challenged the constitutionality of an ordinance requiring the addition of barrier curbs, landscaping areas, ground cover, and trees to existing lots in several zoning districts. The court said that plaintiffs' reliance on *Dolan* was misplaced because, unlike Mrs. Dolan, the plaintiffs were not required to deed portions of their property to the city and the required exaction was the result of a legislative determination affecting many landowners. *Id.* at 203.[7]

This Court denied certiorari. But Justices Thomas and O'Connor dissented "[b]ecause the petition poses a substantial federal question concerning regulatory takings and because there is confusion in the lower courts." *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. at 1116 (Thomas, J., dissenting from denial of certiorari). The dissenting justices expressly questioned the wisdom of treating legislative enactments with special deference.

> It is hardly surprising that some courts have applied *Tigard*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the

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[7] Three Georgia Supreme Court justices dissented, urging application of a multi-factored "benefit-extraction" analysis based primarily on the *Nollan* "close nexus" and *Dolan* "rough proportionality" tests to determine whether an exaction is an expense that in fairness and justice should be paid for by the public as a whole. *Id.* at 204.

> taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id.

Almost eight years after *Parking Association of Georgia* was decided, the lower courts remain hopelessly divided on how to interpret the governing precedents and principles when faced with a takings challenge to legislatively imposed exactions. The author of the majority opinion in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, expressed frustration with the split within that court.

> The differing views of the members of the Court in this case derive principally from varying interpretations of governing precedents. As to [one] dissenting opinion, the difference is essentially one of application, but as to [the other], it is a profound difference from the majority as to the understanding and interpretation of what the many governing precedents say and mean.

Id. at 482-83.

Only this Court can resolve the conflict in the state and lower federal courts.

II

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW

The Fifth Amendment to the United States Constitution provides in relevant part that private property shall not "be taken for public use without just compensation." The Takings Clause protects individual property owners from government actions that impact arbitrarily and unevenly on isolated individuals. *See* Huffman, James L., *Colloquium on* Dolan v. City of Tigard: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 145 (1995). Justice Holmes wrote that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922).

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court said that regulation goes "too far" when it fails to substantially advance a legitimate government interest or denies all economically viable use of property. Regulation fails to substantially advance a legitimate government interest if there is no "nexus" between a permit condition and the public purpose requiring the condition. *Nollan*, 483 U.S. at 837. Government regulation in *Nollan* took the form of an exaction—the California Coastal Commission imposed a condition requiring the property owner to dedicate a strip of beach in order to obtain a permit to rebuild his house. *Id.* at 827-28. This Court held that there must be a nexus between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection, a

permit condition is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted).

Seven years later, in *Dolan v. City of Tigard*, 512 U.S. 374, this Court defined how close a "fit" is required between the burdens imposed by a development exaction and the burdens created by a proposed development plan. Where a nexus is found, there must also be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—"some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added).

A development exaction is a demand that a property owner give up something of value as a condition of obtaining government approval to build on property. An exaction can take the form of land, an interest in land, or money. *See* Burling, James S., *Development Fees and the Supreme Court's Takings Jurisprudence: A Close Fit?*, ALI-ABA Course of Study Materials, Inverse Condemnation and Related Government Liability (1996). And exactions can be imposed on an individual and discretionary basis or by legislation of general applicability. Regardless of their form or source, the requirement that exactions have a nexus and are subject to "rough proportionality" is perfectly sensible and effective to insulate landowners from overreaching governmental entities that might otherwise take unfair advantage of persons during the application process.

Esperanza did not dispute the existence of a connection or nexus between the traffic mitigation fees imposed on its project and the County's desire to accommodate increased traffic on local transportation systems. Rather, Esperanza argued that the connection was legally insufficient—the amount of the fees has no relationship to the impact of the development on local

transportation systems. The court below ruled that legislatively imposed land use exactions, because they are legislatively imposed, can evade the searching judicial inquiry of *Dolan*. But there is "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application [of *Dolan*] only to administrative or quasi-judicial acts of government regulators." Callies, David L., *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999).

The Fifth Amendment itself does not distinguish between kinds of property that may be taken or the manner by which property is taken. U.S. Const. amend. V. And some courts and legal scholars conclude that *Nollan* and *Dolan* show this Court's intent to set out principles for all property and land use regulation matters. *See, e.g., Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 483 ("[T]he Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test."); and Callies, *supra*, at 567 (The *Nollan* and *Dolan* decisions involved property dedications, but the nexus and proportionality rules are of more universal application.).

Significantly, both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action.[8] In *Nollan*, this Court, responding to Justice Brennan's dissent, noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements." 483 U.S. at 833 n.2. In other words, just as in the present case, the Coastal Commission's statewide exaction policy was applied on a uniform and consistent basis. The

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[8] The blending of legislative, administrative, and judicial functions is common in land use decisionmaking. *See* Reznik, *supra*, at 257-66.

statutory requirement in *Dolan* that landowners contribute to transportation infrastructure was also generally applicable and was adopted through legislative action. *Dolan*, 512 U.S. at 378 (noting that the community development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways").

Legislatively imposed exactions have become an increasingly popular method of funding local projects, and a manageable and predictable test would benefit both property owners and government. The artificial distinction between fees imposed by legislative acts and those imposed by quasi-adjudicative acts does not further the Takings Clause's substantive protection of private property. And, as demonstrated by the facts of this case, the existence of a nexus is not sufficient, "or else a minimal public burden or insignificant need created by the project could justify a massive exaction." Burling, *supra*, at 103.

III

THE MANNER BY WHICH GOVERNMENT TAKES PRIVATE PROPERTY SHOULD NOT DICTATE THE CONSTITUTIONAL TEST APPLIED TO A REGULATORY TAKINGS CASE

The choice of some lower courts to apply different constitutional tests based on whether an exaction is imposed by legislative enactment or quasi-adjudicative administrative decision ignores the policy problems *Nollan* and *Dolan* were intended to resolve. The close nexus and rough proportionality tests formulated by those cases seek to prevent coercive and unfair government behavior when a property owner seeks government's permission to use property in a particular way.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court explained that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just

compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The requirements of a nexus and rough proportionality provide a means to ensure that the purpose of the Fifth Amendment is fulfilled. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (The New York Court of Appeals noted that a rent stabilization ordinance transferred significant, distinctive, apartment ownership prerogatives to Lenox Hill Hospital without its having to endure the burdens and costs of ownership. *Id.* at 481. The court concluded that the ordinance failed the constitutional test because it created an "indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders." *Id.* at 483.). *See also* Huffman, *supra*, at 150 ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure." *Id.* at 152.).

Legal scholars argue that neither the Fifth Amendment nor the takings precedents support a legislative/adjudicative distinction between exactions, and those scholars urge an integrated doctrine that recognizes the constitutional equivalency of all exactions. *See* Huffman, *supra*, at 150 (Dean Huffman acknowledges the important procedural implications of a legislative/adjudicative distinction, but goes on to say that "it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property rights. From the point of view of the property owner, the consequence of a taking is the same whether done by the legislative, executive, or judicial branches of government. The Fifth Amendment draws no such distinction."). *See also* Callies, *supra*, at 575 (Land development conditions require a legitimate state interest, nexus and proportionality. "These rules extend to exactions beyond physical dedications even

though *Nollan* and *Dolan* were land dedication cases. . . . Why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless." *Id.*).

Those courts that distinguish between legislative and adjudicative exactions claim that when exactions are imposed in the form of generally applicable legislation, property owners do not encounter the heightened risk of extortionate use of the government's police power to impose unconstitutional exactions. *See, e.g., Ehrlich v. City of Culver City*, 911 P.2d at 444. Legal scholars disagree. *See* Reznik, *supra*, at 251 ("The extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." *Id.* at 267.); Huffman, *supra*, at 146 (Government is reluctant to compensate property owners impacted by regulation. And, "[t]he drafters of the takings clause understood that we should expect nothing different from government. Absent judicial enforcement of the takings clause, governments have every incentive to take private property without compensation. Democracy will deter such wealth redistribution only when large numbers of people are likely to bear the costs. The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy." *Id.*).

One commentator argues that local legislative bodies acting in their legislative capacity may be more likely to use the police power to exact unconstitutional conditions than in the adjudicative setting. Reznik, *supra*, at 270-72. Indeed, it is highly probable that grossly disproportionate exactions will result from broadly applicable, generalized exaction programs. Those types of programs do not allow government to consider

widely varying individual circumstances, and do not provide a means to accommodate those who do not fit within a program's general categories. The facts of this case provide a good example of the kind of disproportionate fee that can result when there is no opportunity for an individual to say, "I'm different."

Parties to adjudicative proceedings have significant procedural rights that may enhance equal treatment for competing interests. Reznik, *supra*, at 273. But the only safeguard against legislatively imposed extortionate exactions is found in the political process. The California Supreme Court said that

> [w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.

San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d at 105. *See Rogers Machinery v. Washington County*, 45 P.3d at 982, wherein the Court of Appeals of Oregon cited the quoted language.

While the democratic political process may, as the California Supreme Court suggested, protect against "extortionate fees for all property development," it is doubtful that the political process would work as efficiently to remove government officials who impose extortionate fees on only some forms of property development. Developers are exactly the kind of minority whose interests might be ignored by the majority. And they are oftentimes not local and thus are unable to participate in the local political process. *See* Reznik, *supra*,

at 271-72. The Takings Clause is intended to protect against that sort of majoritarian oppression.

The use of arbitrary distinctions to apply a less exacting standard of review to legislatively imposed exactions can result in grossly disproportionate exactions, as it did in this case. Local governments will prefer to utilize their legislative power to impose exactions if such exactions are not subject to the same exacting standard as applies to adjudicative exactions.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: October, 2002.

Respectfully submitted,

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FILED APR. 24, 2002

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL FOR
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

AGENCIA LA ESPERANZA CORPORATION, INC.,	G027288
Plaintiff and Appellant,	(Super. Ct. No. 777514)
v.	OPINION
ORANGE COUNTY BOARD OF SUPERVISORS et al.,	
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Richard M. Aronson, Judge. Affirmed.

Pacific Legal Foundation, James S. Burling, and Meriem L. Hubbard for Plaintiff and Appellant.

Laurence M. Watson, County Counsel, Thomas C. Agin, Assistant County Counsel, and Nicholas S. Chrisos, Deputy County Counsel for Defendants and Respondents.

* * *

To obtain approval and building permits, Orange County developers of nonresidential buildings are required to pay development fees based on the square footage of their projects. Arguing that this fee calculation methodology does not adequately link the fee amount to the impact of the developments on the county's infrastructure, a self-storage facility developer sued to have the fees assessed on its project reduced, contending the current fee scheme violates a variety of constitutional, statutory and case laws.[1] Concluding the developer's arguments are without merit, we affirm.

I. Background

In January 1997, the Orange County Environmental Management Agency approved Agencia La Esperanza's (Esperanza) plans to build a 110,414 square foot self-storage facility in Aliso Viejo. Building permits were issued in June 1997 but were conditioned upon Esperanza paying development fees totaling $60,727 assessed under the Moulton Parkway/Laguna Niguel Area and Coastal Area Road Improvement and Traffic Signals fee programs. Like those on the vast majority of nonresidential development projects undertaken in Orange County, the fees were calculated based on te square footage of the project. These onetime fees are designed to mitigate the traffic impact of such developments on the affected surrounding area. While Esperanza paid the fees and has now completed the project, it sued the Orange County Board of Supervisors and the Orange County Public Facilities and Resources Department (County), contending the fee structure violates the requirements of Government Code section 66000 et seq. (the Mitigation Fee Act) and amounts to an

---

[1] Now also on appeal are *Extra Space of Laguna Hills v. San Joaquin Hills Transportation Corridor Agency* (G028469) and *Extra Space of Laguna Hills v. City of San Clemente* (G027806), cases involving similar facts and legal issues.

unconstitutional taking because the amount of the fees is unrelated to the volume of traffic the project generates. In its petition for writ of mandate and complaint, Esperanza sought to have the County enjoined from continuing to assess development fees in an unlawful manner, sought a declaratory judgment to permit the County to adjust development fees on an individual basis, sought injunctive relief to prevent the County from continuing to refuse to reduce development fees, claimed the County was in violation of Government Code sections 66001, subdivision (b) and 66005, and contended that the fees assessed by the County were an unapproved special tax and amounted to a violation of its civil rights.

Following a bench trial based on stipulated facts, judgment was entered against Esperanza on all allegations in February 2000. A request for statement of decision was denied as not timely filed. This appeal followed.

II. Discussion

The crux of Esperanza's appeal is a single question: what is the appropriate standard by which a court is to assess the reasonableness of the relationship between the fees imposed on a development project and that project's impact on the affected community? Government code section 66001, subdivision (b) specifically states "[i]n any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." Here, Esperanza contends not only that there is no reasonable relationship between the fees assessed on their projects and the projects impact on the affected surrounding areas, but also that heightened scrutiny, as delineated in the line of cases following *Nolan v. California Coastal Com'n* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374,

is the appropriate standard for judicial review of the fees imposed on its project by the County.

As noted by our Supreme Court in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, California law draws no distinction between the physical taking and the imposition of fees, but, contrary to Esperanza's contention, limits the application of heightened scrutiny to land use cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." (*Id.* at p. 868.) More specifically, the *Ehrlich* court observed that where the monetary exactions are imposed "neither generally nor ministerially, but on an individual and discretionary basis, . . . the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." (*Id.* at p. 876.) Here, the calculation of development fees, imprecise as it may be, is applied uniformly, generally, and ministerially. As a result, heightened scrutiny is not triggered.[2]

Esperanza make much out of what it perceives as the fundamental unfairness of a system that ties project fees to square footage. It contends that case-by-case analysis of each development project by the county would more precisely allocate development costs among projects based on the volume of traffic each is projected to generate based on its intended use. While such a system would likely shift infrastructure development costs among various projects, it would also, without providing any increase in overall revenue, significantly increase the cost to the County of reviewing and analyzing each set of plans submitted for approval.

---

[2] The parties stipulated that the fee computation for the self-storage facilities projects included three factors: the anticipated use (single-family unit, multifamily unit or nonresidential), the gross square footage or number of units, and the area of benefit as defined in the fee program (for example, the Moultan Parkway fee program.).

Imperfect as the current method of assessing development fees and allocating the costs local infrastructure development may be, the *Ehrlich* court specifically noted that "no 'precise mathematical calculation is required'" provided the County "'make[s] some effort to quantify its findings in support of the dedication [or monetary exaction].'" (*Ehrlich v. City of Culver City*, *supra*, 12 Cal.4th at p. 873.)

Here, the County has adopted an approach that assesses fees in a general and consistent manner based on a reasonable relationship between the development project and the fees assessed. What's more, because the fee is assessed only when the initial building permit is issued—and only an increase in square footage (regardless of changes in usage) would trigger an assessment of additional development fees—the initial fee assessment is the County's only opportunity to recoup the costs of meeting the affected area's infrastructure needs. As a result, we conclude the trial court did not err when it found that the County's method of allocating development fees is acceptable under the terms of the Mitigation Fee Act, and is not subject to heightened scrutiny under the guidelines detailed in *Ehrlich*.

Esperanza further contends that the Legislature's 1996 modification to the Government Code subsequent to Ehrlich changes the standard of review of development fees from rational basis to heightened scrutiny. We disagree with this interpretation. The applicable 1996 amendment merely broadened the definition of "fee" in Government Code section 66000 to include both monetary exactions imposed uniformly or on an ad hoc basis. As the County notes in its respondent's brief, neither the revised statutory language nor the legislative history regarding the 1996 amendment indicates the Legislature sought to modify the judicial standard of review of such fees.

Esperanza also raises a collection of state and federal constitutional claims on appeal. These contentions, including deprivation of substantive due process and equal protection, and

illegal imposition of special taxes, are without merit because they are premised on the erroneous assumption that the County's method of allocating development fees is "irrational, arbitrary and discriminatory." As we have noted, the County's fee allocation methodology is none of these. While large nonresidential projects are assessed proportionally greater development fees than are smaller nonresidential ones, the fees are assessed in a uniform and consistent manner which is roughly proportional to the burden each project imposes on the surrounding infrastructure. As a result, we conclude the trial court did not err in rejection Esperanza's various constitutional arguments. The judgment is affirmed. The County shall recover its costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.

Appendix B–1

FILED MAY 22, 2002

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

AGENCIA LA ESPERANZA CORPORATION, INC.,	)	G027288
	)	(Super. Ct. No. 777514)
Plaintiff and Appellant,	)	
	)	ORDER DENYING
v.	)	REHEARING AND
	)	MODIFYING
ORANGE COUNTY BOARD OF SUPERVISORS et al.,	)	OPINION; NO CHANGE IN
	)	JUDGMENT
Defendants and Respondents.	)	

The petition for rehearing is DENIED.

The opinion is modified as follows. On page 2 of the slip opinion, strike the second sentence in the section entitled "I. Background" and replace it with the following sentence:

"Building permits were issued in June 1997 but were conditioned upon Esperanza paying development fees of $60,727 assessed under the Moulton Parkway/Laguna Niguel

Area program and $134,153 assessed under the Coastal Area Road Improvement and Traffic Signals fee program."

The modification does not change the judgment.

SILLS, PJ.
SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.
RYLAARSDAM, J.

BEDSWORTH, J.
BEDSWORTH, J.

Appendix C–1

FILED JULY 10, 2002

Court of Appeal, Fourth Appellate District, Division Three - No. G027288

S107268

IN THE SUPREME COURT OF CALIFORNIA

En Banc

AGENCIA LA ESPERANZA CORPORATION,
Plaintiff and Appellant,
v.
ORANGE COUNTY BOARD OF SUPERVISORS et al.,
Defendants and Respondents.

Petition for review DENIED.

Brown, J., was absent and did not participate.

GEORGE
Chief Justice

FILED FEB. 28, 2000

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Exempt from Filing Fees Pursuant to Gov't Code § 6103

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE,
CENTRAL JUSTICE CENTER

AGENCIA LA ESPERANZA CORPORATION, INC.,	Case No.: 77-75-14
Plaintiff and Petitioner,	ASSIGNED FOR ALL PURPOSES TO JUDGE RICHARD M. ARONSON DEPARTMENT C27
v.	
ORANGE COUNTY BOARD OF SUPERVISORS; ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT; and DOES 1 through 50,	~~(PROPOSED)~~ **JUDGMENT**
Defendants and Respondents.	

This cause came on for trial on a written stipulation of facts on January 21, 2000, in Department C27 of the above-entitled court, the Honorable Richard M. Aronson, Judge, presiding. The court sat without a jury, a jury having been duly waived. Counsel for each party filed written points and authorities. Plaintiff/Petitioner appeared by its attorney, Ronald Zumbrun. Defendants/Respondents appeared by their attorney, Laurence M. Watson, County Counsel, by Nicholas S. Chrisos, Deputy. No statement of decision has been timely requested.

Having considered the evidence, and oral and written statements of counsel, and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that

1. Plaintiff/Petitioner's Petition for Writ of Mandate is denied;

2. Plaintiff/Petitioner's Request for Declaratory Relief is denied;

3. Plaintiff/Petitioners's Request for Injunctive Relief is denied;

4. Plaintiff/Petitioner shall take nothing by reason of its complaint/petition herein;

5. Defendant shall recover its costs.

Dated: FEB 28 2000

RICHARD M. ARONSON
Judge of the Superior Court

FILED MAR. 09, 2000

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE,
CENTRAL JUSTICE CENTER

AGENCIA LA ESPERANZA CORPORATION, INC.,	Case No.: 77-75-14
Plaintiff and Petitioner,	ASSIGNED FOR ALL PURPOSES TO JUDGE RICHARD M. ARONSON DEPARTMENT C27
v.	
ORANGE COUNTY BOARD OF SUPERVISORS; ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT; and DOES 1 through 50,	**NOTICE OF ENTRY OF JUDGMENT**
Defendants and Respondents.	

Appendix E–2

TO Plaintiff/Petitioner AGENCIA LA ESPERANZA CORPORATION, INC. and to its attorney of record, Ronald Zumbrun of the Zumbrun Law Firm:

NOTICE IS HEREBY GIVEN that on February 28, 2000, judgment was entered in the above-entitled action in favor of Defendants/Respondents ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT and against Plaintiff/Petitioner AGENCIA LA ESPERANZA CORPORATION, INC.

DATED: March 9, 2000 LAURENCE M. WATSON, COUNTY COUNSEL
THOMAS C. AGIN, ASSISTANT and NICHOLAS S. CHRISOS, DEPUTY

By /s/ Nicholas S. Chrisos
Nicholas S. Chrisos, Deputy

Attorneys for Defendants and Respondents

Appendix F–1

DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS SECTION IS CURRENT THROUGH THE 2002 SUPPLEMENT (2001 SESSION) ***
INCLUDING URGENCY LEGISLATION THROUGH 2002 REG. SESS. CH. 201, 7/22/02 AND 2001-2002 3RD EXTRA SESS. CH. 4XXX, 5/06/02

GOVERNMENT CODE

TITLE 7. Planning and Land Use

DIVISION 1. Planning and Zoning

CHAPTER 5. Fees For Development Projects

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Cal Gov Code § 66001 (2001)

§ 66001. Procedure in action establishing or increasing fee as condition of approval by local agency

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to

a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

(d) For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make all of the following findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted:

(1) Identify the purpose to which the fee is to be put.

(2) Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.

(3) Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements identified in paragraph (2) of subdivision (a).

(4) Designate the approximate dates on which the funding referred to in paragraph (3) is expected to be deposited into the appropriate account or fund.

When findings are required by this subdivision, they shall be made in connection with the public information required by subdivision (b) of Section 66006. The findings required by this subdivision need only be made for moneys in possession of the local agency, and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date. If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).

(e) Except as provided in subdivision (f), when sufficient funds have been collected, as determined pursuant to subparagraph (F) of paragraph (1) of subdivision (b) of Section 66006, to complete financing on incomplete public improvements identified in paragraph (2) of subdivision (a), and the public improvements remain incomplete, the local agency shall identify, within 180 days of the determination that sufficient funds have been collected, an approximate date by which the construction of the public improvement will be commenced, or shall refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment roll, of the development project or projects on a prorated basis, the unexpended portion of the fee, and any interest accrued thereon. By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

(f) If the administrative costs of refunding unexpended revenues pursuant to subdivision (e) exceed the amount to be

refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

HISTORY: Added Stats 1987 ch 927 § 1, operative January 1, 1989. Amended Stats 1988 ch 418 § 8; Stats 1996 ch 569 § 1 (SB 1693).

MOTION FILED

NOV 2 2 2002

(2)

No. 02-638

In The

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court of Appeal of California, Fourth Appellate District

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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* *Counsel of Record*

24pp

MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The National Association of Home Builders ("NAHB") has received the written consent of the Petitioner to submit this brief as amicus curiae. The letter of consent has been filed with the Clerk of the Court.[1] Respondents did not reply to NAHB's request for consent.

The NAHB respectfully moves this Court for leave to file its amicus brief in support of Petitioner. NAHB wishes to bring to the Court's attention a conflict exemplified by Petitioner's case: confusion exists in numerous courts below as to the proper application of *Dolan v. City of Tigard's* legal standard to legislatively-enacted development exactions, including impact fees. This Court's grant of the petition for a writ of certiorari would define the scope of *Dolan* as it pertains to all development exactions, thereby removing the uncertainty in the courts below.

The NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. The NAHB, therefore, is concerned with any judicial decision that calls into question the legal remedies available to NAHB's members, particularly when any such remedies are

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

restricted by a state or federal court. Protecting our members' fundamental constitutional rights, particularly involving matters related to takings and just compensation, has long been an integral part of our activities.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002).

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SUMMARY OF ARGUMENT

By ruling that a legislatively-enacted development fee does not trigger *Dolan's* "heightened scrutiny" test,[2] the Court of Appeal of California, Fourth Appellate District, has further muddied the waters of one of the tributaries of takings jurisprudence. The Court of Appeal is not alone; much uncertainty exists in Federal and state courts below as to the "legislative-adjudicative" distinction relative to the application of *Dolan*. Further complicating the issue, some courts apply *Dolan* to government-imposed dedications or other physical exactions, yet refrain from applying *Dolan* to impact fees or comparable monetary exactions.

However, the safeguards of *Dolan's* heightened scrutiny test must apply equally to all exactions, because regardless of the source of the exaction, and irrespective of the physical-monetary distinction, the underlying property interests subject to the exaction are indistinguishable under the Constitution. In fact, the protections of the Fifth Amendment's takings clause, which extend to all private property interests, are blind to all purported distinctions.

Choosing not to extend *Dolan* to "legislatively" determined transportation mitigation fees, the Court of Appeal explains away the need for *Dolan's* heightened scrutiny by reasoning that "the calculation of development fees, imprecise as it may be, is applied uniformly, generally, and ministerially." Apparently, the Court of

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[2] *See infra* at 6, for a discussion of the relationship between *Nollan's* "essential nexus" and *Dolan's* "rough proportionality" legal tests for evaluating the constitutionality of governmental development exactions. The tests, which require a heightened level of legal scrutiny for government-imposed development exactions, are hereinafter referred to as "*Dolan*" or "heightened scrutiny" tests.

Appeal is satisfied that this legislative enactment is imbued with a readymade buffer that will prevent against the type of regulatory leveraging that would otherwise beg for a *Dolan* analysis.

However, the Court of Appeal misses the mark. It ignores a glaring reality in the realm of land use and development law: most land use policy, which is made at the local level, is infused with a mixture of "legislative" and "quasi-adjudicative" decision-making. Development fees that are calculated and enacted "legislatively" are nevertheless applied on an individual, case-by-case basis; the risk of regulatory leveraging is present regardless of how the government entity or exaction is categorized. The safeguards of *Dolan's* heightened scrutiny test should not be sacrificed to an inexact distinction between local governmental bodies.

Moreover, the Court of Appeal notes that monetary exactions that are imposed on an individual and discretionary basis are worthy of a *Dolan* analysis but that the same fees applied "uniformly, generally, and ministerially" are not. The Court of Appeal intimates that the risk of governmental leveraging associated with the case-by-case adjudicatory imposition of monetary exactions is not pervasive in the context of legislatively-authorized, generally applicable fees.

But, to the property owner who is obligated to swallow his poison, regardless of the form of the exaction, or whether it is rendered legislatively or administratively, the potential hazard is the same: a taking is a taking. It matters not to him, or to the Constitution, the identity of the taker, nor the form of the taking. With the safeguards of *Dolan*, the property owner at least stands the chance of

avoiding being the proverbial owner who is "unreasonably forced to bear the regulatory burdens of many."[3]

For these reasons, this Court should grant certiorari to define the application of *Dolan*, which in turn would lend more certainty to the property development approval process.

REASONS FOR GRANTING THE WRIT

I. DOLAN'S HEIGHTENED SCRUTINY SHOULD BE APPLIED TO DEVELOPMENT EXACTIONS REGARDLESS OF WHETHER AN EXACTION IS IMPOSED LEGISLATIVELY OR THROUGH A QUASI-ADJUDICATIVE PROCEEDING

"A city council can take property just as well as a planning commission can." This admonition from Justice Thomas's dissent in *Parking Ass'n of Georgia v. City of Atlanta* truly cuts to the heart of the debate over the application of *Dolan*. Recognizing that it makes no good sense to hold a takings analysis hostage based on the *type* of governmental entity responsible for the potential taking, Justice Thomas, with whom Justice O'Connor joined in dissent, spied the potential confusion in this area of the law well in advance of the instant case. *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S 1116, 1117-1118 (1995) (Thomas, J., dissenting from denial of certiorari).

Given the interlocking roles of local legislative and quasi-adjudicative bodies, the "distinction between

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[3] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.* at 1119. In practice, scores of local land use decisions are made daily wherein the local decision-maker arrives at the decision after performing a hybrid of legislative, administrative, and quasi-judicial functions. The Court of Appeal, in withholding the application of *Dolan* to a legislatively-enacted transportation mitigation fee,[4] fails to recognize that local governments do not follow strict notions of separations of powers requiring independent legislative, executive, and judicial branches with distinct roles.[5]

In a well-researched article covering this area of the law, one commentator notes the frequency with which local legislative bodies perform various administrative functions and administrative bodies exhibit legislative qualities, thus rendering any formal distinctions "ineffective in practice." *See*, Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 261 (2000). Furthermore, disagreement even exists amongst the courts in determining which decisions are "legislative" and which are "adjudicative." *Id.* at 258.

To illustrate this point, the author uses the example of rezoning. Generally, the power to rezone is reserved to locally-elected legislative bodies. However, even though adopted by the legislative body like other legislation,

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[4] Please see, Petition For Writ of Certiorari, app. A-4.

[5] *See*, Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 Stetson L. Rev. 627 (1996), for an interesting discussion detailing how local legislative bodies may sit in an executive or a quasi-judicial capacity to decide how regulations should be applied in particular cases.

rezonings that amend the text or map of a zoning ordinance are normally site specific. Unlike typical legislative enactments, which are widely applicable, and which impact large numbers of parties, these rezonings rely on case-specific facts and often apply to a single party. What happens in practice is that the local legislative entity, through its exclusive power to rezone, renders a quasi-judicial decision limited to the sole applicant for rezoning. Reznik, *supra* at 261. (citations omitted).

To this end, the Court of Appeal's decision[6] rests upon an exaggerated partition between the local governmental bodies that enact and apply impact fees. In withholding the application of *Dolan's* analysis to the impact fee imposed upon Petitioner, the Court of Appeal casts a blind eye to the potential for "regulatory leveraging" that can easily take place at the legislative level. In reality, "[L]ocal government structure combines legislative and administrative functions, and the land use process relies heavily on administrative discretion and flexible piecemeal decisionmaking, making it difficult for courts to determine when a decision is sufficiently legislative in character." Reznik, *supra*, at 247-248. Thus, *Dolan* must be read in conformity with the realities of the local land use process in order to ensure the protection of all private property rights under the Constitution.

When *Dolan* is applied to all development exactions, regardless of their source, courts are spared the burden of sorting through the "legislative-adjudicative" morass and

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[6] The Court of Appeal adopted the "guidelines" from *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal.), *cert. denied*, 519 U.S. 929 (1996), which held that a development fee was subject to *Dolan's* heightened scrutiny because the city had exercised discretionary power in imposing and calculating the fee rather than doing so pursuant to legislative enactment.

property owners are accorded a fair measure of constitutional protection.

A. DOLAN'S ANALYSIS IS A LOGICAL FRAMEWORK UNDER WHICH TO TEST THE CONSTITUTIONALITY OF EXACTIONS IRRESPECTIVE OF WHICH BRANCH OF GOVERNMENT IMPOSES THEM

By its very nature, *Dolan's* "heightened scrutiny" test is well-conceived to evaluate the constitutionality of development exactions that are imposed either by legislative or quasi-adjudicative fiat.

Unlike "conventional" takings, which might result from either the government's actual physical invasion or occupation of property,[7] or the government's noninvasive, regulatory restriction of a property owner's intended use of the property,[8] the taking in *Dolan* concerned development conditions that required the property owner to "dedicate" a portion of her property in order to proceed with development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Building upon this Court's previous ruling in

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[7] Commonly referred to as a *per se* taking. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[8] Also generally known as a "regulatory" taking. *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) for a list of three factors often used to test if a regulation has gone "too far" so as to become a taking; *See also, Agins v. City of Tiburon*, 447 U.S. 255 (1980) (compensable taking occurs where a regulation either "fails to substantially advance a legitimate state interest" or where it "deprives an owner of economically viable use of his property."). The exaction imposed in *Dolan* was both "regulatory" and "*per se*" in that the government conditioned approval on the property owner's obligation to dedicate private property for public use.

Nollan v. California Coastal Commission,[9] which required that there be an "essential nexus" between a government-conditioned dedication and the government's interest in imposing it, this Court in *Dolan* developed the "rough proportionality" test, which requires that there be a "rough proportionality" between the projected impacts of the development and the exaction imposed upon the property owner as a condition of development. *Dolan*, 512 U.S. at 391. While no precise mathematical calculation is required, the burden rests with the government to make "some sort of individualized determination" that the required dedication is related "both in nature and extent" to the impact of the proposed development." *Id.*

Essentially, *Nollan* ("essential nexus") and *Dolan* ("rough proportionality") constitute two separate tests in the takings analysis; however, because the essential nexus test announced in *Nollan* was further enhanced and refined by *Dolan*,[10] the legal standard discussed herein is referred to as "*Dolan's*" heightened scrutiny. Taken together, the tests represent an effective method under which to test the constitutionality of all land use exactions.

Applying heightened scrutiny to *both* legislatively-enacted and quasi-adjudicative exactions is logical and necessary. In a recent article emphasizing the merits of *Dolan*, Professor Fred Bosselman explains why *Dolan* makes sense:

> [T]he *Dolan* test is logical and works well, not because of the brilliant constitutional analysis of the Supreme Court, but because the Court

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[9] 483 U.S. 825 (1987).

[10] *See*, John J. Delaney, *What Does It Take To Make a Take? A Post-Dolan Look at the Evolution of Regulatory Takings Jurisprudence in the Supreme Court*, 27 Urb. Law 55 (1996).

> simply followed the body of law set down by most of the state courts before it ... it is logical in its outcome; and it seems to work reasonably well for both developers and local governments.

Fred P. Bosselman, *Dolan Works* in *Taking Sides on Takings Issues: Public and Private Perspectives*, 345, 353 (Thomas E. Roberts, editor, 2002).

Bosselman emphasizes that if the *Dolan* test is limited only to quasi-adjudicative exactions, it will provide a strong incentive for cities to impose all impact fees legislatively to reduce the risk associated with quasi-adjudicative exactions, and will encourage cities to pick any level of fee they choose because the *Dolan* test does not apply. This is likely to produce fees that are "unfair to some or all developers." Bosselman, *supra* at 348. Moreover, were *Dolan's* heightened scrutiny applicable only to quasi-adjudicative proceedings, cities would be encouraged to impose impact fees "without the careful cost-benefit analysis the *Dolan* test requires," which may produce arbitrary results for the developer. *Id.* Thus, unless *Dolan* is applied to legislatively-imposed impact fees or other exactions, vital private property rights will go unprotected solely because of an inexact distinction between local government entities.

B. OTHER COURTS HAVE APPLIED DOLAN EFFECTIVELY TO LEGISLATIVELY-ENACTED EXACTIONS

As Petitioner points out in its Petition for Writ of Certiorari, a host of courts have successfully utilized *Dolan's* heightened scrutiny test, or a comparable legal framework, to evaluate the constitutionality of legislatively-imposed development fee exactions:

Compare, Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 353 (Ohio 2000) ("dual rational nexus test" adopted by Ohio court for impact fee ordinances applies a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (Illinois court applied the "specifically and uniquely attributable test" to county transportation impact fee ordinance, requiring that local government demonstrate a direct proportionality between exaction imposed on new development and the specifically created need for additional traffic); and *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (In striking down legislatively-enacted rent stabilization ordinance as an unconstitutional taking, New York Court of Appeals references *Dolan* in stating that "[w]e are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners."). Pet. 7-9.

Dolan is a straight-forward, logical test. It injects a measure of clarity to a process that is often less than clear. By placing limitations on the type and form of exactions to which *Dolan* applies, the Court of Appeal improperly complicates the takings legal landscape. Certainly, a municipality should not be able to insulate itself from a takings challenge "merely by utilizing a different bureaucratic vehicle while expropriating its citizens' property." *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995).

II. DOLAN'S HEIGHTENED SCRUTINY SHOULD APPLY TO ALL GOVERNMENTAL EXACTIONS REGARDLESS OF WHETHER THE EXACTION TAKES THE FORM OF A PHYSICAL DEDICATION OR A NONPOSSESSORY IMPACT FEE

In addressing substantive questions of takings liability, this Court applies the same underlying principles whether real or monetary property is at issue. *See, Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (relying on a *Penn Central* analysis in determining whether a taking of monetary property had occurred); a*ccord, Phillips v. Washington Legal Found.*, 524 U.S. 156, 176 (1998) (Souter, J., dissenting) (employing *Penn Central* analysis to interest income from client trust fund accounts). Moreover, as this Court has clearly articulated, the Constitution's Fifth Amendment taking guarantee prohibits government from "forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Implicit in the Court's statement in *Armstrong* is the notion of proportionality. To the property owner or developer confronted with a governmental development condition that "exacts" a portion of his property, or mandates the payment of a development fee as a condition of approval, "proportionality" means everything, or it can mean nothing at all. From the property owner's perspective, there is often little difference between a requirement that he deed over his property through dedication or that he pay an impact fee as a cost of utilizing his property. Arguably, the payment of an impact

fee is the ultimate form of dedication.[11] What truly resonates with the property owner is the threat of deprivation or loss: whether through a dedication of property or a dedication of funds, that which is 'taken' goes to public use at the expense of the private property owner. The private property interest can be taken regardless of its form. As one court stated, "[J]ust as forced easements or zoning reclassifications can inhibit the desired use of property, an unreasonable impact fee may affect the manner in which a parcel of land is developed." *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355 (Ohio 2000).

Therefore, without the benefit of *Dolan's* heightened scrutiny analysis, and, more particularly, its "rough proportionality" test, property owners such as Petitioner are severely limited in challenging government-imposed impact fees that are neither fair, nor proportional. In fact, in *Ehrlich v. City of Culver City,*[12] a California case involving a financial exaction, this Court remanded the case "for further consideration in light of *Dolan*," because the Court recognized the logic in applying *Dolan's* heightened scrutiny to test *all* governmental exactions. Instructively, after this Court's remand of *Ehrlich*, the California Supreme Court rejected the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions, stating that, "[I]t matters little whether the local land use permit authority demands the actual conveyance of land or the payment of a monetary exaction." *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996).

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[11] *See*, Fred P. Bosselman, *supra*, at 347.
[12] 512 U.S. 1231 (1994).

While some might argue that *Ehrlich* and the California Supreme Court's subsequent decision in *San Remo Hotel L.P. v. City and County of San Francisco*[13] stand for the proposition that *Dolan* is limited to physical dedications, or only to those monetary exactions that are calculated and imposed on a discretionary and quasi-adjudicatory basis,[14] such a distinction based on the *form* of exaction is not rooted in the realities in which development exactions take place, nor on the history of this Court's treatment of real property and monetary takings cases.

And, it is important to bear in mind that in the regulatory takings context, "analysis of fundamental fairness in allocation of the burdens imposed, secures and implements the original meaning and purpose of the Fifth Amendment."[15] By adopting *Dolan's* heightened scrutiny as the proper constitutional test for all development exactions, a more fair allocation of burdens will indeed be achievable. After all, "[T]he notions of fairness and proportionality are at the heart of all regulatory taking claims."[16]

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[13] 41 P.3d 87 (Cal. 2002).

[14] *See Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002).

[15] Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's Nollan, Dolan, and Del Monte Dunes Decisions*, 34 Urb. Law 155 (2002).

[16] Ziegler, *supra*, at 155.

III. SPIRALING DEVELOPMENT IMPACT FEES IMPOSED BY LOCAL GOVERNMENTS ARE A LEADING CAUSE OF INCREASED HOUSING COSTS AND ARE A CONTINUING THREAT TO HOUSING AFFORDABILITY

Already encountering increases in the categories and amounts of development impact fees being imposed by local governments, property owners view the safeguards of *Dolan* as a necessary check on the government's unlimited regulatory powers. In fact, increased government regulations and attendant fees have been cited as one of the primary factors responsible for the recent spike in housing prices.

For example, a survey conducted recently by the NAHB found that 10 percent of the costs of building a typical new home can be attributed to regulation and regulatory delays and "fees associated with building, plumbing, electrical, ... higher impact analysis fees, and more." *See*, National Association of Home Builders, *Building a Balance: Housing Affordability & Environmental Protection*, (2002). Moreover, some of the fees that developers and builders have long paid, such as charges for tapping into water and sewer systems, have risen in cost disproportionately over the past twenty to thirty years. *Id.* Builders are also being required to pay a larger share of the cost of providing off-site infrastructure improvements such as new schools, fire stations, roads, and other public facilities that benefit an entire community, not just people living in newly-constructed homes. *Id.*

In a telling example, the Home Builders Association of Northern California recently reported that fees imposed in September, 2002, by the city of Livermore, California, and other local government agencies, amounted to more than $118,000 for several homes being built in a local subdivision, including a new fee of $38,000 per home for the preservation of farmland and open space.[17] This amounts to nearly two-thirds of the $183,280 median price of a home in the adjacent Central Valley of California.[18] Over the 30-year life of a mortgage, the Home Builders Association calculated that the development fees would add nearly $283,000 to the total cost for a home buyer.[19]

While the imposition of development impact fees and other exactions has become a reality for the building industry, unless local governments are obligated to more fully account legally for these fees, the costs of building homes will continue to soar. The lion's share of these costs will ultimately be passed along to consumers. Applying *Dolan* equally to all development exactions protects against the unconstitutional taking of private property through unlimited government regulation, and ensures that exactions are imposed proportionally.

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[17] *Home Buyers Face Skyrocketing Development Fees*, Nation's Building News (National Ass'n of Home Builders, Washington, D.C.), Aug., 19, 2002, at 8.

[18] *Id.*

[19] *Id.*

CONCLUSION

The National Association of Home Builders respectfully requests that this Court grant the Petition for a Writ of Certiorari to define the scope of *Dolan*.

DATED: November 21, 2002

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 25 2002

No. 02-638

In The
Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of California

BRIEF AMICI CURIAE OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 37, Building Industry Association of Washington (BIAW) and the New England Legal Foundation (NELF) respectfully submit this brief amicus curiae in support of petitioner, Agencia La Esperanza Corporation. Written consent to the filing of this amicus brief has been granted by counsel for all parties.[1] Copies of the consent letters have been lodged with the Clerk of the Court.

BIAW is Washington state's largest trade association, with over 9,600 members representing over 350,000 Washington citizens who work in various trades associated with the development and construction of residential housing. BIAW members routinely are required to pay impact fees, such as the traffic mitigation fees at issue in this case, as a condition of receiving subdivision approval. BIAW has a substantial interest and stake in the determination of whether such fees must be "roughly proportional" to the impact caused by the proposed development.

The New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a

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[1] Pursuant to Supreme Court Rule 37(6), counsel for amici authored the brief in whole. Amici solely funded the preparation and filing of this brief.

cross-section of large and small corporations from all parts of the Commonwealth, New England, and the United States. NELF's members are affected by the business climate in New England and nationwide. Furthermore, some of NELF's members are directly interested in the issue of regulation of real estate development because they are involved in building, owning, managing, insuring, and financing real property. A healthy real estate climate is a mark of a vital and vibrant economy and depends on secure rights for property owners. For those reasons, NELF's members are concerned about the issues presented in this case.

The opinion below holds that the heightened scrutiny set forth by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) is not applicable to legislatively adopted exactions. As a result, the lower court's ruling stands for the proposition that when conditions are attached to the approval of development permits via legislative authorization, the conditions do not have to be "roughly proportional" to the impact created by the proposed development. Amici believe that the ruling below is incorrect and will severely impact private property rights and affordable housing.

STATEMENT OF THE CASE

This case involves the appropriate judicial scrutiny that should be applied to exactions. An exaction is a demand that a property owner give up something of value – whether it be land, an interest in land, or money – as a condition to obtaining necessary permits or other governmental approvals to build on one's property.

The type of exaction involved in this case is an impact fee. Impact fees are levied by local governments against a proposed new development in order to generate revenue for infrastructure allegedly necessitated by the new development. Impact fees have been an increasingly popular way for governments to raise revenue in lieu of taxes.

In this case, Agencia La Esperanza Corporation (Esperanza) constructed a 110,414 square foot self-storage facility in Orange County, California. As a condition for approval of the project and issuance of building permits, Esperanza was required to pay a total of $194,880 as traffic mitigation fees. The impact fees were computed by looking at three factors: the anticipated use (nonresidential), the gross square footage or number of units, and the area of benefit as defined in the fee program.

The County concedes that it never conducted a traffic analysis to determine the actual impact of the project. Instead, the County lumps the proposed self-storage facility in with other types of commercial uses and applies a uniform fee calculation. The problem is that self-storage facilities generate significantly less traffic than other types of commercial uses. For example, the undisputed evidence established that Esperanza would have to pay the same fee per square foot as a similarly sized medical clinic located in the same area even though the medical clinic generates approximately twelve times as much traffic. Petition for Writ of Certiorari at 3-4.[2] In short, the

[2] This calculation was based upon the Moulton Parkway fee program. Under that program, Esperanza would have to pay approximately $220 per trip generated. Under that same program, however, a

(Continued on following page)

amount of the fee is grossly disproportionate to the impact of the project.

Under this Court's precedent in *Dolan v. City of Tigard*, Esperanza contends that the traffic fee is not related in "extent to the impact of the proposed development." 512 U.S. at 391. Indeed, the California Court of Appeals practically conceded that the imprecision of the calculation does not meet the roughly proportional test of *Dolan*. Pet. for Cert., Appendix A-4 and A-5. Nevertheless, because the traffic fee was *uniformly imprecise*, the California court concluded that constitutional protections established by this Court were not triggered. As stated by the court below:

> Here, the calculation of development fees, imprecise as it may be, is applied uniformly, generally, and ministerially. As a result, heightened scrutiny is not triggered.

Pet. for Cert., Appendix A-4.

The court below held that the heightened standard of judicial scrutiny set forth in *Dolan*, requiring that exactions be roughly proportional to the impact caused by the proposed development, was not triggered because the fees were uniformly applied to project applicants through legislation. The issue presented for this Court's resolution

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clinic would only pay $17.49 per trip and a medical-dental office would pay only $15.22 per trip. Under the second fee program, the Coastal Area Fee Program, Esperanza would have to pay $486 per trip, while a medical clinic would pay approximately $38.64 per trip and a medical-dental office would pay only $33.63 per trip.

is whether the applicability of the constitutional protections established in *Dolan* can so easily be circumvented.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way in conflict with another state court of last resort, or of a Federal Court of Appeals. Rule 10(c) includes as a ground for review when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. Both of these grounds for review are present in this case.

I

THERE IS A SPLIT AMONG STATE AND FEDERAL COURTS THAT SHOULD BE SETTLED BY THIS COURT

Lower courts have been interpreting *Dolan* in an inconsistent manner thus creating a nationwide split of authority on whether *Dolan's* rough proportionality test applies to legislatively enacted exactions. Currently, both scholars and the courts have commented on the significant "split of authority" clouding this issue. *See e.g.*, Faus, Richard Duane, *Exactions, Impact Fees, and Dedications: Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 STETSON L. REV. 675, 693-701 (2000) (recognizing a "nationwide split of authority" on whether the *Dolan* test applies to legislatively enacted, uniformly

applied impact fees); Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 76 NYU. L. REV. 242, 256-57 (2000) ("There is considerable disagreement over whether legislative decisions are subject to *Dolan's* heightened scrutiny review."); *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (there is "considerable doubt" about the applicability of the *Dolan's* rough proportionality test to "legislative, as opposed to administrative exactions"); *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) (the question "has not been settled."); *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 976 (Or. 2002) (A "split of authority exists in lower courts as to whether *Dolan* is limited to development conditions imposed through adjudicatory decisions or whether it extends to those imposed as a result of generally applicable legislation.").

Two Justices of this Court have acknowledged the "conflict" over whether *Dolan's* test should be applied when exactions are imposed through legislation. *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., and O'Connor, J., dissenting from denial of certiorari) ("the lower courts should not have to struggle" with this issue.).

A review of courts dealing with this issue reveals that characterizing the issue as "unsettled" is an understatement. Two federal courts and five state jurisdictions have applied *Dolan's* heightened scrutiny to legislatively imposed exactions. *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (*Dolan* analysis applied to impact fee imposed by ordinance); *National Association of Home Builders of the United States v. Chesterfield County*, 907

F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (*Dolan* applied to a county policy to guide the county's acceptance of proffers); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 388-389 (Ill. 1995) (*Dolan* applied to transportation impact fee ordinance); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to statute requiring apartment owners to renew certain leases with non-private hospital employees); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353 (Ohio 2000) (*Dolan's* "rough proportionality" test applicable to ordinance imposing impact fees); *Trimen Development Company v. King County*, 877 P.2d 187, 191 (Wash. 1994) (*Dolan* applicable to ordinance imposing park development fees).[3]

On the other hand, eight state courts have held *Dolan's* heightened review is inapplicable to legislatively imposed exactions. *See e.g.*, *Home Builders Association of Central Arizona v. City of Scottsdale,* 930 P.2d at 1000 (*Dolan's* rough proportionality test does not apply to water service fee enacted by ordinance and uniformly applied to all properties); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444

[3] A recent Washington Supreme Court case resolved this issue under statutory grounds instead of determining the applicability of *Dolan* to an ordinance requiring all subdivisions to leave 30 percent of the land as open space or pay a fee in lieu. *See Isla Verde International Holdings v. City of Camas*, 49 P.3d 867 (Wash. 2002). As a result, the Washington Supreme Court did not reach the constitutional question.

(Cal.), *cert. denied*, 519 U.S. 929 (1996) (*Dolan* inapplicable to fees imposed legislatively); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (*Dolan* inapplicable to sanitation district fee imposed legislatively); *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200, 203 (1994), *cert. denied*, 515 U.S. 1116 (1995) (ordinance imposing parking lot standards upon parking lot owners held not to violate *Dolan* because it was a legislative determination); *Southeast Cass Water Resource District v. Burlington Northern R. Co.*, 527 N.W.2d 884, 885 (N.D. 1995) (*Dolan* not applicable to requirement that railroad pay costs for alterations of bridge and culverts because imposed under legislative enactment); *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (*Dolan* inapplicable to development impact fees); *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. 1996) (*Dolan* inapplicable to ordinance requiring mobile home park owners to close their parks to pay relocation costs to park residents); *Rogers Machinery, Inc. v. Washington County*, 45 P.3d 966, 967, 982 (Or. Ct. App.), *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (Or. 2002) (*Dolan* inapplicable to traffic impact fee assessed by ordinance).

A survey of lower courts applying *Dolan* confirms that there is much confusion over whether *Dolan's* rough proportionality test should be applied to legislative versus adjudicative land use decisions. The effect is that in some jurisdictions, lower courts will apply the *Dolan* heightened scrutiny to legislatively imposed exactions, while in others, a less stringent review will be conducted on such exactions. This inconsistent application of *Dolan* depending on which jurisdiction you live in results in unequal enforcement of the federal constitution. Property owners

seeking government permits, whether they reside in Washington, New England, or California, are entitled to have their federal constitutional rights consistently and fully protected. The time is ripe for this Court to provide the lower courts with necessary guidance on this issue.

II

WHETHER THE *DOLAN* "ROUGH PROPORTIONALITY" STANDARD APPLIES TO LEGISLATIVELY IMPOSED EXACTIONS PRESENTS AN IMPORTANT QUESTION OF REGULATORY TAKINGS LAW

The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The principal purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40 (1960).

This Court has established a special subset to regulatory takings law when the government conditions the granting of permit approval on an exaction:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the

> government where the benefit sought has little or no relationship to the property.

Dolan, 512 U.S. at 385.

As succinctly put by Justice Harlan over 100 years ago:

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Village of Norwood v. Baker, 172 U.S. 269, 279 (1898).

This Court has formulated a two-part test for use in determining whether an exaction constitutes an impermissible taking. First, the court determines whether an essential nexus exists between a legitimate state interest and the condition exacted by the government. *Nollan*, 483 U.S. at 836. If an essential nexus exists, the court must decide the required degree of connection between the exaction and the projected impact of the proposed development. *Dolan*, 512 U.S. at 386-88. No precise mathematical calculation is required, but the government must make some sort of individualized determination that the exaction is roughly proportional in both nature and extent to the proposed impact of the proposed development. *Id.* at 391.

Under *Dolan*, the burden of proof to justify the exaction is on the government, not the property owner. *Id.* at 374, n. 8. The test set forth in *Dolan* is important because its "rough proportionality" test elevates the level of scrutiny courts must give to exactions and prevents

governments from leveraging permit approval on illegal exactions.

The importance of this case is evidenced on its broad impact and the nature of the issue raised. The outcome of this case will have an impact on anyone who is subject to a legislatively authorized exaction such as an impact fee. This could potentially affect the majority of developers and purchasers of new homes in this nation. Impact fees can range from several hundred dollars to thousands of dollars per home or building. IMPACT FEE HANDBOOK (National Association of Home Builders) 1997 at 2. A study shows that impact fees and regulatory costs account for a nationwide average of 4.5 percent of the cost of a new home. George Avalos, *"Tangle of Red Tape Inflates Costs for Homebuyers in the East Bay,"* CONTRA COSTA TIMES, Sept. 29, 2002. An outrageous example in the San Francisco area of California reflects the effect burdensome exactions can have on housing affordability. In Livermore, California building exactions have topped $100,000 per house. HBA News, *"City of Livermore Tops $100,000 in Home Building Fees"*, July/August 2002 at 14. Because such fees become part of the purchase price, the detrimental effect it has on housing affordability is staggering.

As governments continue to face economic challenges of generating additional revenue to fund needed infrastructure without raising taxes, the trend will be for more local jurisdictions to impose such exactions in increasing amounts. Amici are concerned that without the *Dolan* test, governmental bodies will be able to shift the responsibility for funding general improvements onto a discrete segment of the public. The *Dolan* test ensures that the cost of such exactions does not exceed the development's fair share of the cost of improvements.

Another measure of the importance of this case is the amount of litigation that has already taken place on this issue. The current uncertainty over what standard of review governs such exactions benefits no one. Both developers and governmental bodies deserve to know the appropriate standard of review for determining when an exaction is an unconstitutional taking.

The issue presented in this case involves a substantial federal question involving regulatory takings. The resolution of this issue has far reaching effects and needs to be addressed by this Court.

III

DOLAN'S HEIGHTENED SCRUTINY SHOULD BE APPLIED TO LEGISLATIVELY IMPOSED EXACTIONS

The question presented is whether the "rough proportionality" standard announced in *Dolan* applies to the exaction in this case. Amici contend that it does apply because there is no principled basis for distinguishing between legislative versus adjudicative land use decisions.

Courts limiting the application of the "rough proportionality" standard to purely adjudicative exactions, as opposed to legislatively authorized exactions, reason that the risk of municipal "extortion" is much greater in the adjudicative context. *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-104 (Cal. 2002); *Home Builders Association of Central Arizona*, 930 P.2d at 1000. More specifically, these courts rationalize that the legislative and political processes have more protections in place for landowners from such abuses by government. This reasoning is flawed.

There is no basis for the rationale that legislative and political processes provide more protection to property developers. First, due process does not apply to legislative enactments so landowners or future potential developers are entitled to no notice of proposed impact fee legislation. Second, non-resident landowners and developers have no voting interest in local elections so their outsider interests are clearly in the minority. Third, the interests of even resident landowners or developers are easily discounted as based solely on personal financial interest and not the interest of the community. The correct application of the *Dolan* test protects those minority interests.

Exactions can be imposed unfairly and disproportionately through legislation or on an individual basis. Applying *Dolan* to one form of government action, but not the other, does not make sense. The threat of leveraging discussed in *Dolan* is just as likely to occur in legislative decisionmaking processes as in adjudicative settings. Because both types of exactions involve conditioning governmental land use approval and present the same opportunities for governmental "leveraging," the constitutional protection should be consistently applied.

Two Justices of this Court have cast serious doubt on the theory that legislatively adopted rules should not be subject to rough proportionality review. *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (dissent from denial of petition for writ of certiorari, Thomas, J., joined by O'Connor, J). Justice Thomas points out that:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission

> can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18. A subsequent Illinois state court decision agreed with Justice Thomas' viewpoint. *Amoco Oil Company v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. 1996). That court said, "Certainly, a municipality should not be able to insulate itself from a taking challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property." *Id.* at 390.

The *Dolan* test balances the competing interests of both developers and government and should be applied to all types of exactions. The Supreme Court of Ohio explained such competing interests in holding that *Dolan* was applicable to a legislatively imposed impact fee ordinance for funding roadway improvements:

> We believe this test [Dolan] will adequately balance the interests of local governments with those of property owners. The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.

Home Builders Association of Dayton, 729 N.E.2d at 356.

The case now at bar presents a good example of what happens when *Dolan's* rough proportionality test is held inapplicable to an exaction imposed through legislation. Esperanza is saddled with paying significantly more than its proportionate share of the cost its development will have on traffic. The lower court's decision thus creates a loophole for governments to avoid having to comply with *Nollan/Dolan*. Under the decision below, government entities can use their "leveraging" authority through legislation instead of the adjudicative process to insulate themselves from liability under the Constitution. The Fifth Amendment does not allow such an exemption.

CONCLUSION

Whether *Dolan's* "rough proportionality" standard applies to legislatively imposed exactions is an issue needing definitive resolution by this Court as evidenced by the split of authority across the nation on this issue. Until this Court resolves this substantial federal question concerning regulatory takings law, the *Dolan* standard will continue to be inconsistently applied across the nation by state and federal courts. Amici respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the California Court of Appeals.

DATED: November, 2002.

Respectfully submitted,

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In The

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

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QUESTION PRESENTED

Does the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) apply to a legislatively enacted development fee imposed on a general, ministerial and nondiscretionary basis?[1]

[1] Petitioner frames the question "May a local government avoid the 'rough proportionality' test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions (including 'impact' fees) by legislative enactment?"

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STATEMENT OF THE CASE

The County of Orange ("County"), under authority of California Government Code section 66484.3, requires developers of new residential and non-residential buildings to pay one-time development fees to mitigate the traffic impact of new developments. The fees are based on the number of units in residential projects and the square footage of non-residential projects. Petitioner Agencia La Esperanza Corporation, Inc. ("Esperanza") is one of several developers of self-storage facilities, classified as nonresidential properties, which challenged the fees as violations of the California Mitigation Fee Act (California Government Code section 66000, *et seq.*) and as unconstitutional takings of property as delineated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The California Supreme Court in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996) applied heightened scrutiny under these holdings to a fee applied on an individual and discretionary basis, but not to a legislatively enacted fee which was imposed on a general, ministerial and nondiscretionary basis. Esperanza asserts that the fees imposed by the County did not properly balance the amount of the fees with the impact on infrastructure and are subject to heightened scrutiny under *Dolan*. The California Court of Appeal rejected Esperanza's arguments finding that "the County's method of allocating fees is acceptable . . . and is not subject to heightened scrutiny under *Ehrlich*" and affirmed the trial court judgment in an unpublished opinion, *Agencia La Esperanza Corporation, Inc. v. Orange*

County Board of Suprevisors, G027288.[2] Opin. 4-5. Esperanza filed a petition for review in the California Supreme Court, which denied review on July 10, 2002. This Petition for Writ of Certiorari was timely filed on October 23, 2002.

SUMMARY OF ARGUMENT

The thrust of Esperanza's Petition for Writ of Certiorari is that the *Dolan* "rough proportionality" standard should apply to fees even when they are adopted by legislative action and imposed on a general and ministerial basis rather than on an individual and discretionary basis. Esperanza also argues that lower courts are split on whether the *Dolan* "rough proportionality" standard should apply to such fees.

The County of Orange maintains that review by this Court is not necessary because these legal principles are well settled and treated consistently. The decision of the California Court of Appeal is correct and consistent with the decisions of this Court including the decisions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Court of Appeals analyzed those cases, as applied in *Ehrlich*, and correctly held, like other jurisdictions around

[2] The decision (hereinafter Opin. is attached to the Petition for Writ of Certiorari as Appendix A. The Court of Appeal rejected similar arguments in other unpublished decisions including *Extra Space of Laguna Hills v. San Joaquin Hills Transportation Corridor Agency* and *Extra Space of Laguna Hills v. City of San Clemente*, neither of which is before this Court for review.

the country, that a monetary exaction imposed "uniformly, generally and ministerially," does not trigger the heightened scrutiny of *Nollan* and *Dolan*. Opin. at 3-4.

Petitioner erroneously asserts that there is a conflict among various courts on this issue. In all Takings Clause cases involving legislatively formulated development fees uniformly imposed on a broad class, *Dolan* has been held inapplicable. While the rationale in some cases has differed slightly, the result has been consistent. Thus, contrary to Petitioner's contention, no real conflict exists.

Review should also be denied because the opinion below was issued by the California Court of Appeal which is not the court of last resort in California. Therefore, to the extent that a conflict is asserted, it is not subject to the same level of concern as a conflict among courts of last resort. For these reasons, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS CORRECT AND CONSISTENT WITH THIS COURT'S TAKINGS DECISIONS

The California Court of Appeal followed the line of cases decided by this Court and the California courts interpreting the Takings Clause of the U.S. Constitution as it applies to legislatively imposed monetary charges, the application of which is uniform, general and ministerial. It reviewed the holdings of this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), as applied by

the California Supreme Court to certain fee structures in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). In both *Nollan* and *Dolan*, a local government agency required transfer of an interest in real property as a condition of approval for development of a single parcel. *Id.* at 874. In both of those cases, this Court imposed a heightened level of scrutiny on the exactions because they involved imposition of a requirement to dedicate real property on an individual and discretionary basis that was potentially unfair to a property owner seeking development approval. *Id.* at 866. These combined elements create the possibility of improper use of the legitimate regulatory authority of a local government to leverage a specific interest in real property. *Id.* at 869.

The Court of Appeal relied heavily on the decision in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 in which the California Supreme Court, after remand from this Court, engaged in an extensive review of *Nollan* and *Dolan* as applied to development fees (a recreation fee and a fee for "art in public places") imposed on a proposed development.[3] As observed by the Court of Appeal, the California Supreme Court concluded that California law does not distinguish between a physical taking and the imposition

[3] The *Ehrlich* court noted that scholarly comment on the two cases is almost unmanageably large. *Ehrlich* at p. 869, n.6. That trend has continued and it is now arguable that every conceivable position on the subject has been analyzed, including the benefit of uncertainty, Poirer, Marc. C., *Article: The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L. Rev. 93 (2002), and *Ehrlich* as a clear statement of the probable scope of the law of takings. Faus, Richard D., *Practice Commentary: Exactions, Impact Fees, and Exactions – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000).

of fees but limits the application of heightened scrutiny under *Nollan* and *Dolan* to land use cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." Opin. at 3, citing *Ehrlich* at 868. The *Ehrlich* court observed that where monetary exactions are imposed "neither generally nor ministerially, but on an individual and discretionary basis ... the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." *Id.* at 876. The *Ehrlich* court determined that the individually assessed recreation fee imposed as a condition of approval of a specific project was subject to heightened scrutiny while the legislatively adopted, broadly applied "art in public places" requirement was not. *Id.* at 885-886. Following the holding in *Ehrlich*, the Court of Appeal in this case found that Orange County's calculation of the development fee, while imprecise, was applied uniformly, generally and ministerially and thus, heightened scrutiny was not triggered. Opin. at 4. See also *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 19 Cal. 4th 952 (1999), cert. den., 526 U.S. 1131 (1999) (legislative adoption of a generally applicable rent control law did not result in a taking under *Nollan, Dolan* and *Ehrlich*) and *Home Builders Association of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001) (*Dolan* standard does not apply to inclusionary zoning ordinance applicable to all development in the city).

Further supporting the correctness of the California Court of Appeal's decision is *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) where this Court observed that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of

development on the dedication of property to public use." *Id.* at 702-703.[4] As such, the *Dolan* test would not apply to a development fee.

The California Supreme Court most recently reviewed this subject in *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002). In that decision, the court again reviewed in detail this Court's decisions in *Nollan, Dolan* and *Del Monte Dunes. Id.* at 665-673. It specifically declined the invitation to extend heightened judicial scrutiny to all development fees, adhering instead to the distinction drawn in *Ehrlich* between ad hoc adjudicatory exactions and formulaic, broadly applicable legislative mitigation fees. *Id.* at 670-671.

The Court of Appeal correctly applied the reasoning of *Ehrlich,* in this case. This reasoning is sound, consistent with the holdings of this Court and need not be reviewed again here.

II. THE CASES CITED BY PETITIONERS DO NOT CONFLICT WITH THE HOLDINGS IN *NOLLAN* AND *DOLAN*

Courts have consistently applied the analysis of the California Supreme Court in *Ehrlich* and *San Remo* when considering whether the heightened scrutiny requirements

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[4] It has been suggested in other contexts that the Takings Clause has focused on an interest in physical or intellectual property, not on an obligation to pay money. Faus, Richard D., *Practice Commentary: Exactions, Impact Fees, and Exactions – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675 (2000), citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

of *Nollan* and *Dolan* should apply to development impact fees imposed by local governments. Petitioner claims that cases such as *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995), *Manocherian v. Lenox Hill Hospital*, 643 N.E. 2d 479 (N.Y. 1994) and *Trimen Development Co. v. Kings County*, 877 P. 2d 187 (Wash. 1994), among others, conflict with this analysis. On closer inspection, the cases cited by Petitioner are significantly distinguishable both factually and legally. Courts have treated legislatively imposed development fees applied uniformly, generally and ministerially consistently following *Nollan* and *Dolan*.

A. Courts Have Treated Legislatively Adopted Fees Consistently

Petitioner cites cases from various state and federal jurisdictions in an effort to show a conflict among the courts in their application of heightened scrutiny under *Nollan* and *Dolan* to development fees and other conditions not requiring dedication of property. Careful review of those cases indicates instead, that various courts have consistently declined to apply heightened scrutiny to legislatively imposed development fees applied uniformly, generally and ministerially. Results differ, as will be seen, only when the condition imposed is individual and discretionary or relates to the use of real property, neither of which exists in this case. The following cases all considered legislatively imposed development fees applied uniformly, generally and ministerially and concluded that heightened scrutiny under *Nollan* and *Dolan* did not apply.

In *National Association of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (1995) the District Court reviewed a statutory policy requiring cash payments, in exchange for approval of residential rezoning applications, to provide for the capital improvements required by the development. The *Chesterfield County* court concluded that it did not need to determine whether *Dolan* applied because it found the policy, applicable to all residential rezoning requests, to be capable on its face of application consistent with the *Dolan* standard. Since it did not apply *Dolan* to the payment in question, it cannot be considered a conflict. In fact, rather than create a conflict, like most courts, it noted that *Dolan* is relevant, if at all, as the test that a particular application of the policy might be required to meet. *Id.* at 168. This parallels the result reached by the California Supreme Court in *Ehrlich* (12 Cal. 4th at 872-875) that legislatively imposed development fees applied uniformly, generally and ministerially are not subject to the *Dolan* test and cannot be seen as a conflict in how to apply *Nollan* and *Dolan*.

In *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P. 2d 993, cert. den., 521 U.S. 1120 (1997), the Arizona Supreme Court found that a legislatively adopted water resources fee applicable to all new realty developments was not subject to *Dolan* "heightened scrutiny" and noted favorably the distinctions drawn by the California Supreme Court in *Ehrlich*. *Id.* at 486. Thus, the case supports the principle that legislatively imposed development fees applied uniformly, generally and ministerially are not subject to the *Dolan* test.

Also consistent with the reasoning of the Court of Appeal in this case is *Krupp v. Breckenridge Sanitation District*, 19 P. 3d 687 (Colo. 2001), where the court indicated

that "Application of the *Nollan/Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination conditions continued development on the exaction of private property for public use." *Id.* at 696. The *Krupp* Court found the fee to be a valid, legislatively established fee, which did not fall into the narrow category of charges subject to heightened scrutiny under *Nollan/Dolan. Id.* at 692, 695. The court also noted that the Colorado regulatory takings statute codified the *Nollan/Dolan* test, including the distinction between legislative and adjudicative determinations, and therefore that test did not apply to a legislatively formulated fee imposed on a broad class of property owners. *Id.* at 696.

The Oregon Court of Appeal in *Rogers Machinery, Inc. v. Washington County*, 45 P. 3d 966, *petition for review to the Supreme Court of Oregon denied*, 52 P.3d 1057 (2002) agreed with the California Supreme Court's analysis in *Ehrlich* and *San Remo Hotel* and noted that "With near uniformity, lower courts applying *Dolan* to monetary exactions have done so *only* when the exaction has been imposed through an adjudicatory process; they have expressly declined to use *Dolan's* heightened scrutiny in testing development or impact fees imposed on broad classes of property pursuant to legislatively adopted fee schemes." *Id.* at 978 (emphasis in original), citing *Home Builders Association of Central Arizona v. City of Scottsdale*, 930 P. 2d 993, cert. den., 521 U.S. 1120 (1997); *Krupp v. Breckenridge Sanitation District,* 19 P. 3d 687; *Waters v. Montgomery County*, 650 A. 2d 712, 724 (1994); *Town of Flower Mound v. Stafford Estates Ltd. Partnership,* 71 S.W. 3d 18 (Tex. App. 2002) (petition for review granted Dec. 12, 2002).

Thus, there is no conflict among the courts in the application of heightened scrutiny under *Nollan/Dolan* to legislatively imposed development fees applied uniformly, generally and ministerially.

B. Courts Have Treated Legislative Land Use Regulations Consistently

As with legislatively imposed development fees, there has been no conflict in the treatment by the courts under *Dolan* of legislatively imposed land use regulations applied uniformly, generally and ministerially.

Parking Association of Georgia v. City of Atlanta, 450 S.E. 2d 200, cert. den., 515 U.S. 1116 (1995), addressed a legislative enactment applicable to many landowners which regulated the use of a portion of their lands unlike the adjudicative decision to condition in *Dolan*. *Id.* at 203. The Georgia Supreme Court concluded that *Dolan* did not apply and that the City had complied with the "rough proportionality" test of *Dolan* in any event. *Id.* at 202-203. Justices Thomas and O'Connor dissented from the denial of certiorari on the basis of confusion among lower courts. 515 U.S. 1116.

In *Southeast Cass Water Resource District v. Burlington Northern Railroad Company*, 527 N.W. 2d 884 (1995), the North Dakota Supreme Court examined a legislatively imposed requirement mandating that railroads provide culverts and other openings through their bridges and other improvements to permit drainage. The North Dakota Supreme Court applied relevant federal and state precedents to conclude that there is no taking where a police power regulation required railroads to absorb the cost of changing its bridges and culverts to accommodate

drainage changes. *Id.* at 893-894. *Nollan* and *Dolan* were found not to apply to a legislated police-power regulation as opposed to a municipal "adjucative decision to condition." *Id.* at 896.

C. Courts Have Treated Individual and Discretionary Land Use Conditions Consistently

Petitioner cites several cases purporting to indicate a conflict in application of *Dolan* to legislatively imposed development fees. The following cases from that group instead address land use restrictions applicable only to individual properties or imposed on an individual and discretionary basis.

For example, *Manocherian v. Lenox Hill Hospital*, 643 N.E. 2d 479 (N.Y. 1994), was decided only a few months after *Dolan* and only incidentally cites that case. The *Manocherian* court applied the *Nollan* analysis to a rent control statute that limited the owner's right to possess, use or dispose of their property.[5] While adopted as legislation, it applied only to a small group of properties rented by hospitals as housing for their staffs. *Id.* at 480-481. The regulation was not a fee, but a limitation on use of property. *Id.* at 480-481. As such, it is consistent with the majority of courts which have applied *Nollan, Dolan* scrutiny to individualized regulations affecting the use of property rather than to fees.

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[5] The decision of the Court of Appeals of New York in *Bonnie Briar Syndicate v. Town of Mamaroneck*, 721 N.E. 2d 971 (1999) may cast doubt on the *Manocherian* holding.

The decision of the First Circuit in *City of Portsmouth New Hampshire v. Schlesinger*, 57 F. 3d 12 (1995) parallels closely the California Supreme Court decision in *Ehrlich* in that it invalidated a fee imposed on an individual and discretionary basis after extensive negotiation. The decision of the City Council in *Schlesinger* was essentially fact specific and therefore administrative. As such, heightened scrutiny applied. *Id.* at 17.

D. No Conflict Occurs Where Courts Apply State Law Standards Instead of *Dolan*

Instead of presenting conflicts in application of the Takings Clause, the following cases appear to apply state law analysis.

Trimen Development Co. v. Kings County, 877 P. 2d 187 (Wash. 1994) was an application of a state law standard of review to a legislative fee requirement. The court concluded that the fees were lawful if they met a state statutory standard that required the fees to be imposed pursuant to a voluntary agreement and reasonably necessary as a result of the development or to mitigate its effects. *Id.* at 192. The case, decided only one month after *Dolan*, did not apply the *Nollan/Dolan* test or engage in any analysis of takings jurisprudence, but merely cited *Dolan* in dicta. *Id.* at 194. The court did not apply *Dolan* to a legislatively adopted development fee. Since the decision was based on application of state law requirements, it does not indicate a conflict in application of the *Dolan* standard.

The decision in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E. 2d 384 (Ill. 1995) cannot truly be considered a conflict in the way courts apply *Nollan* and *Dolan* either. In *Northern Illinois*

Home Builders, the Illinois Supreme Court simply followed its long-standing state law doctrine as set forth in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 176 N.E. 2d 799 (Ill. 1961) which applied a strict "specifically and uniquely attributable" test. *Northern Illinois Home Builders*, 649 N.E. 2d at 389. This Court declined to adopt that test. *Dolan*, 512 U.S. at 389-90. Thus, since it does not apply heightened scrutiny under *Dolan* it does not demonstrate a conflict in application of the *Dolan* test.

In *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E. 2d 349 (2000), the Ohio Supreme Court considered the constitutionality of an ordinance that established an impact fee payable by developers to contribute to the cost of new roadways. In its analysis, the Ohio Supreme Court reviewed *Nollan* and *Dolan* and then imposed what it called a "dual rational nexus" test which requires a court to determine: (1) whether there is a reasonable connection between the need for additional capital facilities and the growth generated by the proposed development and (2) if so, whether there is a reasonable connection between the expenditure of the funds collected via the fee and the benefits accruing to the subdivision. *Id.* at 354-355. The court held that the fee met both prongs of the test. *Id.* at 356. It did not apply the *Dolan* "rough proportionality" test to the development fee. It also ignored the conclusion of this Court in *Del Monte Dunes* that *Nollan* and *Dolan* apply only to exactions of real property rather than fees (*Del Monte Dunes*, 526 U.S. at 702-703). *Home Builders Association* is the only case since the California Supreme Court decision in *Ehrlich* which did not consider or apply the *Ehrlich* analysis to an impact fee. The Ohio Supreme Court instead found a rational nexus between the benefit

of the improvement to the developer and the fee. *Home Builders Association*, 729 N.E. 2d at 128. This is not a conflict in application of *Nollan* and *Dolan*, but is, in effect, a new state law test for that state. *Id.* at 356. Indeed, the Oregon Supreme Court explained: "The court's analysis is difficult to square with *Dolan* and, in fact, mirrors the more deferential test traditionally used for user fees and other purely monetary assessments." *Rogers Machinery, Inc. v. Washington County*, 45 P. 3d 967, 978, petition for review to the Supreme Court of Oregon denied, 52 P.3d 1057 (2002).

While these cases apply different tests under state law to development fees, none arrives at a different result by application of *Dolan* and, consequently, these cases do not demonstrate a conflict among states in Taking Clause doctrine that requires review.

III. POSSIBLE CONFLICT AMONG STATE COURTS IS LESS IMPORTANT WHEN THE DECISION IS NOT BY THE HIGHEST STATE COURT

Under the rules of this Court, even the existence of possible conflict among state courts does not require review where the decision is not by the highest state court.

Supreme Court Rule 10(b) provides that a reason to grant a petition for writ of certiorari is that a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals.

Although Rule 10 is not the exclusive reason for determining whether to grant a petition for writ of certiorari, it suggests that decisions by state courts that are not

the court of last resort are less important in assessing the existence of conflicts between courts than are decisions by state courts of last resort.

There are good reasons for this view. First, a decision by a state intermediate appellate court is less likely to be considered outside of its jurisdiction. Second, the decision of the intermediate appellate court can be corrected later by the state court of last resort.

Here, the California Court of Appeal rendered the decision. It is not the court of last resort. The California Supreme Court is, and it denied review of this case.

IV. CONCLUSION

Courts throughout the country have been consistent in consideration of heightened scrutiny under *Dolan* to legislatively imposed development fees applied uniformly, generally and ministerially. The conflict asserted by Esperanza is without merit as a basis for review by this Court. The County of Orange respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-638

In the

Supreme Court of the United States

AGENCIA LA ESPERANZA CORPORATION, INC.,

Petitioner,

v.

ORANGE COUNTY BOARD OF SUPERVISORS and ORANGE COUNTY PUBLIC FACILITIES AND RESOURCES DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13pp

QUESTION PRESENTED

May a local government avoid the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions (including "impact" fees) by legislative enactment?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Agencia La Esperanza Corporation, Inc. (Esperanza), respectfully files this reply to the opposition to Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Respondents Orange County Board of Supervisors and Orange County Public Facilities and Resources Department do not deny that this case presents an important question of federal regulatory takings law. Instead, Respondents claim that there is no conflict among the lower federal and state courts regarding the applicability of *Dolan*'s "rough proportionality" test to development exactions imposed by legislative enactment. That position is not supported by legal scholars (*see, e.g.*, Petition for Writ of Certiorari (Petition) at 6), or by the arguments presented in Respondents' opposition to Esperanza's petition for writ of certiorari.

ARGUMENT

I

DEVELOPMENT FEES RECEIVE THE SAME CONSTITUTIONAL PROTECTION AFFORDED OTHER KINDS OF EXACTIONS

Respondents argue that "the *Dolan* test would not apply to a development fee." Opp. at 6. But there is nothing in this Court's jurisprudence to lend credence to that assertion. All but one of the cases relied on by the *Dolan* majority in formulating the "rough proportionality" test involved municipal ordinances—legislation of general applicability—requiring developers to dedicate property or cash to help finance the construction of public facilities. *See Dolan v. City of Tigard*, 512 U.S. 374, 400 (1994) (Stevens, J., dissenting). "In assessing the legality of the conditions, the courts gave no

indication that the transfer of an interest in reality was any more objectionable than a cash payment." *Id.*

In the early case of *Village of Norwood v. Baker*, 172 U.S. 269 (1898), this Court treated the taking of property in the form of fees the same as the taking of property in the form of land. The Village of Norwood condemned a strip of land through the center of a single parcel for the purpose of constructing a road, and then assessed the owner for the full costs of the condemnation. The owner sued, contending that the assessment was not in proportion to any benefits received by her; rather, the condemnation was intended to connect two roads abutting her property for public convenience. This Court agreed, and wrote:

> It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and, therefore, should specially contribute to the cost incurred by the public. *It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.*
>
> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation."

172 U.S. at 279 (emphasis added).

Respondents claim that language from this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), precludes the application of *Dolan* to a development fee. Opp. at 5-6. But that case did not address the issue of excessive exactions. In *City of Monterey v. Del Monte Dunes*, this Court questioned the extension of *Dolan*'s rough proportionality test to permit denials. Rough proportionality is an unhelpful standard when addressing a permit denial. In *Dolan*, as in this case, the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate amount by which a bicycle trail could reduce the impact. But such an approach is not helpful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest—after all, it is difficult to determine whether a permit denial is roughly proportional to anything. As this Court said, the proportionality standard "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is *based not on excessive exactions* but on denial of development." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 703 (emphasis added).

This Court's decision in *City of Monterey* did nothing to erase the conflict in the state and lower federal courts over the appropriate standard of review applied to exactions imposed as a condition of a development permit. *See* Steven J. Eagle, *Symposium: When Does Retroactivity Cross the Line?:* Winstar, Eastern Enterprises *and Beyond: Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000).

The lower court in this case noted that even the California Supreme Court, in *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996), did not distinguish between the physical taking and the imposition of fees. Appendix at A-4. Indeed, there is

no constitutional basis for making such a distinction. *See* Petition at 17.

II

THE APPLICATION OF *DOLAN*'S STANDARD OF "ROUGH PROPORTIONALITY" CANNOT DEPEND ON WHETHER AN EXACTION IS IMPOSED BY LEGISLATIVE OR ADJUDICATIVE GOVERNMENT ACTION

Respondents try to dispense with any conflict among the lower federal and state courts by recasting several of the cases that apply *Dolan* to legislatively imposed exactions as cases that really involve adjudicatively imposed exactions.[1] By so doing, Respondents highlight a major source of confusion plaguing the lower federal and state courts, and another reason this Court should accept this case for review to provide much needed guidance on the application of *Dolan*.

The legislative/adjudicative distinction is not a viable means for determining whether or not to apply *Dolan*'s "rough proportionality" standard because it is difficult to pigeonhole local government action as legislative, administrative, or judicial. Local governments are not structured under strict separation of powers principles, and commonly combine these functions in land use decisionmaking. *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 257-61 (2000). *See also* Eagle, *supra*, at 1042 (The problem of discerning which statutes are legislative and which are adjudicative for

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[1] *See* discussions of *City of Portsmouth New Hampshire v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), Petition at 10, Opp. at 12; *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), Petition at 8-9, Opp. at 11; and *National Association of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 18838 (4th Cir. July 30, 1996), Petition at 9-10, Opp. at 8.

purposes of a *Dolan* analysis is apt to be open-ended and chronic.).

Both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action. *See* Petition at 17-18. And Justice Souter took the position that the *Dolan* majority mischarcterized the case "as involving an 'adjudicative decision' to impose permit conditions, but the permit conditions were imposed pursuant to Tigard's Community Development Code." *Dolan*, 512 U.S. at 413 (citation omitted) (Souter, J., dissenting). Thus, Justice Souter concluded, the only "adjudication" involved whether to grant a variance from the permit conditions.

Inna Reznik authored the most comprehensive article on the problems encountered when differentiating between legislative and adjudicative decisions in land use cases. *See* Reznik, *supra*. In the article Ms. Reznik describes the results of a survey of 29 cases. She put each case into one of three categories: (1) scheduled exactions (where an amount of money or land was specified in advance by a legislative body); (2) negotiated (authorized by a legislative body but individually determined in response to a specific development proposal; or (3) not clear. *Id.* at 252. The results show a great deal of confusion among the courts, and an inconsistent application of the legislative/adjudicative distinction.

Of the cases involving exactions that were scheduled by the legislative body (those closest to legislative decisions), just as many courts applied *Dolan*'s "rough proportionality" test as refused to apply it because of the belief that *Dolan* applies only to adjudicative decisions. Reznik, *supra*, at 254. In challenges to negotiated exactions (those closest to adjudicative decisions), five out of nine applied *Dolan*'s "rough proportionality" standard. *Id.* at 255. And finally, in nine cases where the court did not clarify the nature of the exaction, eight out of nine applied the "rough proportionality" standard. *Id.* at 256.

Respondents cannot explain away the conflict among the lower federal and state courts by characterizing every case as involving adjudicative instead of legislative action.

III

DOLAN'S "ROUGH PROPORTIONALITY" TEST SETS A CONSTITUTIONAL FLOOR, BELOW WHICH EACH INDIVIDUAL STATES' PROTECTION OF PROPERTY RIGHTS MUST NOT FALL

Among the cases cited by Petitioner as applying *Dolan*'s standard of "rough proportionality" to legislatively imposed exactions are cases from Washington, Illinois, and Ohio.[2] Respondents' claim that these cases do not present conflicts because they appear to apply state law analysis. Opp. at 12-14. In fact, in each of the cases, the court examined the standard articulated in *Dolan* and concluded that the federal constitutional floor of protection was met.

In *Dolan*, this Court decided how close the connection must be between a required dedication and the proposed development in order to be constitutionally sufficient to justify conditions imposed on a building permit. 512 U.S. at 389. This Court examined "representative decisions" of the state courts and found that the levels of scrutiny adopted in those decisions ranged from "very generalized statements as to the necessary connection" to "a very exacting correspondence." *Id.* at 389-90. This Court concluded that the "intermediate position," adopted by a majority of the states and based on some form of the reasonable relationship test, "is closer to the

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[2] *Trimen Development Co. v. Kings County*, 877 P.2d 187 (Wash. 1994) (*see* Petition at 9); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (*see* Petition at 7-8); and *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000) (*see* Petition at 7).

federal constitutional norm than [the other two tests]." *Id.* at 391.

Trimen Development Co. and *Home Builders Association of Dayton* both involved forms of the "reasonable relationship" test falling within the middle level of scrutiny adopted by this Court in *Dolan* as the constitutional norm. *Dolan*, 512 U.S. at 390-91. In *Trimen*, the court determined that the fees at issue were "reasonably necessary" as a direct result of the proposed development. *Trimen*, 877 P.2d at 194. *See* Petition at 9. In *Home Builders Association of Dayton*, the court adopted a dual rational basis test "based on the *Nollan* and *Dolan* cases" (729 N.E.2d at 356), and applied a "middle level of scrutiny" that considers whether there is a "reasonable connection" between needs and projected growth and between expenditures and benefits (*id.* at 355-56). *See* Petition at 7.

The court in *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, examined this Court's takings jurisprudence to establish a minimum level of protection under the Takings Clause. *Id.* at 388-89. The court then applied the "specifically and uniquely attributable" standard described by this Court in *Dolan* as a more exacting standard of scrutiny than is required by the Federal Constitution (*Dolan*, 512 U.S. at 389-90). *See* Petition at 7-8.

The courts in these cases did not abandon the federal standard for their own state tests. The courts relied on this Court's constitutional takings decisions to determine that the state tests met or exceeded the federally established level of scrutiny—the "rough proportionality" test of *Dolan*.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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